COPY

Supreme Court, U. S.
FILED
JAN 20 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1144

LEONARD M.,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

Of Counsel:

Elliot B. Feldman, Esq.
9465 Wilshire Blvd.
Suite 617
Beverly Hills, CA 90212

QUIN DENVIR,
State Public Defender of California

RUSSELL I. LYNN
Deputy State Public Defender

LAURANCE S. SMITH
Deputy State Public Defender

455 Capitol Mall, Ste. 360
Sacramento, CA 95814
Telephone: (916-322-5296

Attorneys for Petitioner

SUBJECT INDEX

* * *

TABLE OF AUTHORITIES CITED

TABLE OF AUTHORITIES CITED (cont.)

* * *

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No.

LEONARD M.,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

The petitioner, Leonard M., respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Second Appellate District.[1/] Such judgment became final and was

1. The Court of Appeal for the State of California, Second Appellate District will be referred to hereafter as the "court of appeal".

entered on January 3, 1979 following the issuance of an opinion on October 27, 1978.

OPINIONS BELOW

The opinion of the court of appeal affirming petitioner's conviction in the Juvenile Court for a criminal offense was filed on October 27, 1978. The opinion of that court, which is also reported at 85 Cal.App.3d 887, is attached to this petition as Appendix 'A'. The order of the Supreme Court of California denying discretionary review in petitioner's case was entered on January 3, 1979, and is reproduced in Appendix "B".

JURISDICTION

The jurisdiction of this court is invoked under title 28, United States Code section 1257(3). The order of the court of appeal became final on January 3, 1979 when the Supreme Court of California denied petition for discretionary review. (Calif. Rules of Court, Rules 25, 28.)

QUESTIONS PRESENTED

1. Where a direct appeal is permitted in a criminal or quasi-criminal case by state law, what minimum standards of substantive and procedural fairness are imposed upon the proceedings by the Fourteenth Amendment's guarantee of due process of law; specifically,

A. Are the requirements of due process met when a state reviewing court refuses to determine whether a reasonable trier of fact could have found guilt beyond a reasonable doubt in light of all the evidence presented to it; limiting its review of the facts to mere consideration of whether there is <u>any</u> evidence in the record, standing alone, which supports a finding of guilt?

B. When a finding of guilt of a serious criminal offense is founded upon evidence which must be described as "weak" even by the majority of the court which relied upon such evidence to uphold the conviction, do the requirements of due process permit that court to ignore substantial and uncontradicted

evidence which conclusively establishes the untruth of the "weak" inculpatory evidence?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved is the Fourteenth Amendment, which provides in pertinent part:

Section 1: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunitites of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This case arises from an incident which took place in Los Angeles, California on June 21, 1976. It was alleged and found true by a Juvenile Court judge that on that date, petitioner engaged in sexual intercourse with a

five-year old female neighbor, Perele M.

At trial, the juvenile court heard testimony from Perele M. that petitioner called to her and her four-year-old brother over a back fence to "come over to my house". Perele then related that once inside, petitioner removed his trousers as well as her panties, that he laid down on top of her, and the he performed an act of full sexual intercourse with her, penetrating her very deeply. Perele fixed the time at 11:30 a.m.

Perele assertedly informed her mother that "the boy next door, the motorcycle boy" had committed a sexual act with her. However, Perele's mother did not either report the incident to police nor seek a medical examination of Perele at that time. Instead, Perele was taken to a park to play. Her mother hoped that having a talk with petitioner's mother would "clear up the matter".

Between 5:00 and 6:00 p.m. the same day, Perele's mother conversed with petitioner's mother. Evidently, it was not until Leonard's mother had expressed

skepticism that her son would do such a thing, and behaved in a generally "cool" manner throughout the conversation, that a decision was made to report the matter to authorities.

After a police officer arrived at 7:30 p.m., Perele was taken by her mother to an emergency hospital at about 8:30 p.m. She was examined there by a Dr. Chavez, who reported that there was some redness and swelling present in the vaginal area. However, there was no evidence of bleeding, laceration or hematoma. These conditions would normally follow sexual penetration by a 16-year-old.

The hymen was intact, and no sperm was present in the vaginal tract.

Dr. Chavez indicated that the observed irritation could have been caused by sexual contact. However, as the Court of Appeal acknowledged in its opinion, this condition could as easily have been caused by intervening events. (App. A, 85 Cal.App.3d at 890.) "In short, the case against [petitioner] rested entirely upon the oral testimony of the young girl". (Ibid.)

Petitioner denied raping Perele.

On the afternoon of June 19, petitioner had returned home at about 5:00 p.m. and went to bed ill. Though he had revived somewhat during the evening of June 20, petitioner was sent home from work ill on the morning of June 21. Petitioner was observed by his grandfather, Mr. Litt, at 10:30 a.m. that date, lying in bed and coughing. According to his mother, the cough later developed into pneumonia. Mr. Litt did some watering in the yard outside until 11:15 or 11:25 a.m., and then went "upstairs". At 11:30 a.m., an appliance serviceman arrived and was admitted by petitioner. He worked at the residence for about two hours, and observed no small children present during that time.

Petitioner also produced the testimony of a Dr. Miller, a specialist in adolescent psychiatry. According to Dr. Miller, petitioner had a stable personality, and was naive and uncurious about sex. Petitioner was active in the Explorer Scouts and tinkered with

motorcycles; these activities consumed most of petitioner's "libidinal energies".

Dr. Miller went on to say that he had worked with adolescents who had been involved in molestation of younger children. Such youngsters generally showed a pattern of poorly formed identify, low self-esteem, and depression. They usually evidenced serious maladjustment in school, and were often involved in other criminal activity.

Miller concluded that petitioner's personality and social adjustment were highly inconsistent with pedophilia. Leonard also called as a character witness his scoutmaster, Mr. Lambert, who described petitioner as truthful, "a very excellent boy," and not prone to sexual misconduct.

* * * *

I

WHERE STATES ESTABLISH AVENUES OF APPELLATE REVIEW, DUE PROCESS DOES NOT PERMIT STATE REVIEWING COURTS TO REFUSE TO ENFORCE THE CONSTITUTIONAL GUARANTEE OF PROOF BEYOND A REASONABLE DOUBT WHILE PROVIDING EXTENSIVE REVIEW OF ALL MANNER OF SECONDARY QUESTIONS

This case raises a number of fundamental questions, not addressed in any recent holdings of this Court, concerning the extent to which the Fourteenth Amendment's guarantee of due process requires the states to maintain any minimum level of integrity and fairness in legally prescribed method by which facts are found at trial and reviewed on appeal.

If there were heretofore any question or uncertainty regarding the manner in which California Appellate Courts approach the task of review of facts in criminal cases, this case should put it

/

/

/

to rest.[2] All that a California Court will look for in the record is that statement of any one witness to the effect that "the defendant did it". Once such a scirtilla of evidence is found--and it matters not whether the scintilla is a strong or weak one--all review ends: "The young girl testified quite positively that [petitioner] had invited her into his home, where he was alone, and there committed an act of intercourse with her. That testimony, accepted by the trial court, was sufficient to sustain the finding". (App. A, pg. 2, 85 Cal.App.3d at 889.)

Following the dubious but well-entrenched California rule that on appeal only those portions of the evidence which support conviction will be considered, and that any thing inconsistent with

---

2. As of this writing, there are pending two other Petitions for Certiorari which raise an issue similar to that presented here: Stewart v. California, # 78-5589; and Dennis and Donald D. v. California, # 78-817.

/

/

guilt will be ignored,[3] the Court of Appeal proceeded to do just that: Even though one of the state's own witnesses conceded that it was a medical impossibility for Perele to have been raped in the manner she described and emerge from the experience with an unruptured hymen, (App. A at 2, 85 Cal.App.3d at 890) this evidence was treated as nonexistent on appeal. Also ignored, of course was a veritable parade of witnesses, including a disinterested appliance repairman, who established that the prosecutrix was not even in petitioner's company on the morning in question.

Here, it does not appear that the trial judge expressed any rational basis for his rejection of the overwhelming showing of innocence found in this record. It can be thus clearly seen that unless the right to proof beyond a reasonable doubt is enforced on appeal -- something California

---

3. People v. Ruscoe, 54 Cal.App.3d 1005, 1011-1012, 127 Cal.Rptr. 6. Cited at pg. 29 of California's brief in the State Court of Appeal.

flatly and expressly refuses to do--there will be no assurance that this Court's ruling in In re Winship (1970) 397 U.S. 358 will ever be paid more than rote lipservice, or that indeed trials themselves will not end up being decided according to the substantial evidence rule.

We think this state of affairs argues strongly for the proposition that the guarantee of due process includes the right to argue on appeal that one is factually innocent, and that given all the evidence, no reasonable trier of fact could have been persuaded to a moral certainty of the contrary.

The typical refusal evidenced here of a state first-level reviewing court to be concerned with the central issue of guilt greatly accounts, in our respectful opinion, for the conversion of the criminal case into a procedural game of wits instead of a search for truth. This in turn leads to a widespread public feeling that our courts occupy themselves primarily with arcane exercises in sophistry through which they

routinely free guilty persons on the basis of "technicalities"; the innocent being totally ignored.

The test of review applied by the court of appeal here was that formulated by the California Supreme Court in People v. Newland (1940) 15 Cal.2d 678, 681, 104 P. 2d 778: "The court of appeal will not attempt to determine the weight of the evidence. . . it must be made clearly to appear that upon no hypothesis whatsoever is there sufficient substantial evidence to support the conclusion reached in the court below." And as repeated again and again in such more recent California decisions as People v. Reyes (1974) 12 Cal.3d 486, 497 [526 P.2d 225], "The test on appeal is . . . not whether the evidence proves guilt beyond a reasonable doubt." (Emphasis added.)

Testimony given by representatives of California's appellate judiciary at a recent legislative hearing place in even starker relief the aspersion with which prevailing philosophy regards the idea that state reviewing courts should

consider it their duty to correct "mere" substantive injustices.[4]

For example, after a spokesman for the State Supreme Court confirmed that that court regards itself as ". . . not a court of error, it is not necessarily a court of justice. . . .",[5] and that decisions are often upheld if supported by any evidence at all,[6] a representative of the courts of appeal, also the president of the State Judge's Association, then went on to confirm that factual review on that level is limited to consideration of whether there is any evidence which is not "inherently improbable," and that even overwhelming evidence inconsistent with guilt is treated as nonexistent.[7] Having

4. California Legislature, Assembly Committee on Criminal Justice, Scope of Appellate Review (hearing transcript) September 11, 1978.

5. Ibid., p. 21.
6. Ibid., p. 22.
6. Ibid., pp. 26-27.

opened with the observation that the prime function of the courts of appeal is to "develop the common law" and deal with precedent;[8] the witness closed with the sentiment that there was no room for improvement in California's system of justice, which he described as "the best system in the world."[9]

In respectful disagreement, we submit that at least one substantial improvement is required: protection of innocent persons who are mistakenly convicted of crimes, whether or not the mistake has significant "policy" implications.

In Burks v. United States (1978) ___ U.S. ___ (57 L.Ed.2d 1), where the Court held that double jeopardy prohibits a retrial after the reviewing court has found the evidence insufficient, the Chief Justice observed that the Court had previously reviewed factual records from federal convictions and found that the prosecution had failed to prove guilt beyond a reasonable doubt. "In holding the evidence insuffi-

8. Ibid., p. 24
9. Ibid., p. 32

cient to sustain guilt, an appellate court determines that the prosecution has failed to prove guilt beong a reasonable doubt. (See American Tobacco Co. v. United States (1946) 328 U.S. 781, 787 n. 4." (Id. at p. 4636, n. 10.)

In Freeman v. Zahradnick (1977) 429 U.S. 1111, the Court was presented with this issue as a constitutional question. However, the Court denied certiorari, apparently because the Court would have also had to tackle the question of whether this kind of a claim would be cognizable on federal habeas corpus (an issue which is not presented by this record). Justices Stewart, Marshall, and Brennan dissented, however, and urged that the application of the "beyond a reasonable doubt" standard of Winship should not be immune from constitutional enforcement on appeal. Justice Stewart posed the following hypothetical situation which could lead to "bizarre results":

"Defendant A, whose guilt is conclusively established by 20 eyewitnesses, clear fingerprints, and an unimpeachable confession, is denied due process if the jury is instructed that he can be found guilty by a preponderance of the evidence;

that much is clear from Winship. Defendant B, against whom there is but one flimsy piece of evidence -- which falls far short of sufficiency to prove guilt beyond a reasonable doubt but barely meets the 'greater than zero' test of the no evidence rule -- is not denied due process so long as the instructions are proper. Clearly, however, defendant B is much more likely to be innocent that defendant A."

As Justice Stewart aptly concluded,

"That pair of results could well be thought to be at war with the purpose of the Winship decision -- to reduce 'the risk of convictions resting on factual error', to provide 'concrete substance for the presumption of innocence', and to ensure that 'the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned'. 397 U.S. at 363-364."

In our view, both the cause of due process and the cause of public respect for the judicial process would be better served if at least those state reviewing

/

/

/

/

/

/

/

courts which hear appeals on a non-discretionary, first level basis[10] followed the example of their counterparts in other civilized nations by giving as much attention to the question of whether the case before them has been satisfactorily

/
/
/
/
/
/
/
/
/
/
/

10. We quite purposely limit our argument to those stages of the appellate process wherein review is of right, as opposed to higher levels of the process wherein review is discretionary. Many countervailing considerations could well justify discretionary tribunals such as this Court or most state supreme courts in leaving review for correctness to the first-level appellate courts, reserving their own scarce resources for matters of transcending public importance. Distinctions between rights inerent in the non-discretionary vs. discretionary stages of the appellate process have been drawn by the Court on many occasions, e.g., Anders v. California (1967) 386 U.S. 738.

resolved on the facts as is afforded to procedural matters.[11]

In England, "appellate judges tend to regard their job as complete when they reach a correct conclusion on the case presented to them . . . furthermore, they are so involved with the idea of the supremacy of Parliament that they do not think much about their own law-making functions. . . ." M. Zander, Cases and Materials on the English Legal System (1973) p. 420.

The right of a litigant to a hearing from a first-level reviewing court should be conditioned more on whether he has been unjustly convicted than upon whether

11. The scope of review on first-level appeal suggested herein would cause no actual increase in the workload of state appellate courts. Such courts are already required to read the entire record in order to determine, for example, whether procedural errors pinpointed by the counsel are harmless. From this point, it requires very little extra effort for the court to ". . . [give] earnest thought in this case to whether it is one in which we ought to set aside the verdict of the jury notwithstanding the fact they had every advantage and, indeed, some advantages we do not enjoy." (Regina v. Cooper (Sean) (1969) 1 Q.B. 267, 271.)

his case presents some novel point of "policy" which the legal profession would enjoy seeing discussed in the reports.[12/] Moreover, as should be readily apparent to those who have followed the mushrooming habeas corpus dockets of federal district courts, the refusal of state courts to be much concerned with the actual correctness of judgments doubtless contributes to feelings of resentment and injustice, shared by the guilty and innocent alike, which lead them to an obdurate determination to pursue every possible road of attack on their convictions.

* * *

12. As this Court pointed out not long ago in another context, there is a strong "public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth". (Alderman v. United States (1969) 394 U.S. 165, 174.)

CONCLUSION

We respectfully urge that no further time should pass before this Court decides, for the first time in the history of the republic, upon the degree to which the Fourteenth Amendment speaks to the substantive aspects of the criminal appellate process.

Respectfully submitted,

QUIN DENVIR
State Public Defender

RUSSELL I. LYNN
Deputy State
Public Defender

LAURANCE S. SMITH
Deputy State
Public Defender

Of Counsel
ELLIOT B. FELDMAN

APPENDIX A

APPENDIX "A"

Opinion of California Court of Appeal

[Civ.No. 30946, Second Dist., Div. Four, Oct. 27, 1978.]
(85 Cal.App.3d 887)

In re LEONARD M., a Person Coming Under the Juvenile Court Law.
KENNETH F. FARE, as Acting Chief Probation Officer, etc.
Plaintiff and Respondent, v.
LEONARD M., Defendant and Appellant.

A minor appeals from an order finding him to be a person within the meaning of section 602 of the Welfare and Institutions Code and directing a suitable placement for him. We affirm the order.

The order is based on a finding that the minor, a 16-year-old boy, had committed a lewd act on a 5-year-old neighbor girl. On this appeal he contends: (1) that the evidence does not support the finding; and (2) that he was denied the effective assistance of counsel because his trial attorney did not seek a psychiatric examination of the child. We reject both contentions.

I

The young girl testified quite positively that the minor had invited her into his home, where he was alone, and there committed an act of intercourse with her. That testimony, accepted by the trial court, was sufficient to sustain the finding.

II

However, the evidence was otherwise weak. The girl was not examined by a physician until some hours after she had complained to her mother. The examination disclosed no bleeding, an unruptured hymen, and no indication of semen, but did show a slight redness of the vagina--a fact possibly explainable by intervening events. The medical evidence was that it was medically impossible for penetration of the extent to which the girl testified to have occurred without rupture of the hymen. Psychiatric testimony on behalf of the minor was to the effect that the alleged conduct was inconsistent with his character. In short, the case against the minor rested entirely on the oral

testimony of the young girl.

In People v. Lang (1974) 11 Cal.3d 134 [113 Cal.Rptr.9, 520 P.2d 393], dealing with a case involving several factual similarities, the Supreme Court said, in footnote 3 on page 140: "[Citation.] Such an examination would seem a minimum protection for a defendant charged with molesting a child, and only the rarest of cases would excuse counsel from obtaining one. As the trial judge indicated in this case, shortly before finding defendant guilty, 'I don't know how bright these girls [the twins] are. I don't know what their capacity for fantasy is.' The results of a psychiatric examination of the twins might easily have tipped the balance in this close case in favor of defendant, whose strongest defense was that the twins lied about him." That statement was quoted with approval by the Chief Justice in her dissent in People v. Thomas (1978) 20 Cal.3d 457, at page 472 [143 Cal.Rptr. 215, 573 P.2d 433].

Based on that language, and

on the weakness of the case against defendant, resting as it does on the testimony of the young girl, the minor here contends that the failure of his trial counsel to seek a psychiatric examinaiton of the girl evidenced incompetency that deprived him of a fair trial.

We reject that contention. Lang did not hold that every failure to seek a psychiatric examination of an alleged victim in child abuse cases is, as a matter of law, an incompetent representation. Its holding went no further thatn to require appellate counsel to raise that matter on appeal--a duty ably performed by the appellate counsel in this case. However, as the Supreme Court pointed out in People v. Jenkins (1975) 13 Cal.3d 749, at pages 754-755 [119 Cal.Rptr. 705, 532 P.2d 857], quoting from People v. Garrison (1966) 246 Cal.App.2d 343, 350-351 [54 Cal.Rptr. 731]: ". . . However, in the absence of affirmatively showing that counsel acquiesced through ignorance of the facts or the law, defendants

are not entitled to relief. 'The failure of counsel to object at the trial does nor ordinarily indicate either incompetence of counsel or unfairness to the client. The system of objections is a useful tool in the hands of a trained professional for the exclusion of matter which should not be received into evidence. But the indiscriminate use of objections, solely because they are available, aids neither the client nor the cause of justice. The choice of when to object and when to allow the evidence to come in as offered is inherently a matter of trial tactics. Ordinarily the tactical decisions of trial counsel will not be reviewed with the hindsight of an appellate court. [Citations.] The decisions which counsel must make in the courtroom will necessarily depend in part upon what he then knows about the case, including what his own client has told him. There may be considerations not shown by the record, which could never be communicated to the reviewing court as a basis for its decision. Thus, the appellate

court's inability to understand why counsel did as he did cannot be a basis for inferring that he was wrong.'"

Since a psychiatric examination of a witness is open to use by both sides (People v. Blakesley (1972) 26 Cal.App.3d 723, 729 [102 Cal.Rptr. 885]), it is a two-edged sword. Nothing in the record before us indicates that trial counsel was ignorant of his right to seek a psychiatric examination; nothing in that record tells us what investigation he may have made of the ability of the girl to testify honestly and accurately. Since nothing in the record shows that the failure here complained of was not a reasoned tactical decision, we cannot hold that trial counsel was incompetent to the degree that he had reduced the hearing to a "farce or a sham," or withdrew a viable defense.

The order appealed from is affirmed.

Kingsley, J.

Files, P.J., concurred.

JEFFERSON (Bernard), J.--I dissent.

The majority finds no merit in either of the two contentions asserted by the minor on this appeal. I do. The minor's contentions are (1) that the evidence is insufficient to support the finding that the minor committed a violation of section 288 of the Penal Code, and (2) that the minor was denied his constitutional right to effective assistance of counsel at his trial.

I

Insufficiency of the Evidence

In this case before us the victim, a five-year-old neighbor girl, testified that the minor, a sixteen-year-old boy, had actual sexual intercourse with her--not simply the commission of a lewd act. The majority concludes that since this testimony was accepted by the trial court, it ends all consideration of the issue of whether the evidence was sufficient. Automatically, it was sufficient to sustain the finding.

It is with deep reluctance that I must agree that our appellate courts have held that the testimony of

a child complaining witness in a child molestation case, even though uncorroborated, and no matter how lacking in indicia of reliability and trustworthiness, nevertheless is sufficient to support an adult's conviction or a juvenile court's corresponding finding. It has become established law that it is the function of an appellate court "in reviewing a criminal conviction on appeal to determine whether the record contains any substantial evidence tending to support the finding of the trier of fact, and in considering this question we [the appellate court] must view this evidence in the light most favorable to the finding. [Citation.] The test is not whether guilt is established beyond a reasonable doubt. [Citations.]" (In re Roderick P. (1972) 7 Cal.3d 801, 808 [103 Cal.Rptr. 425, 500 P.2d 1].) This same principle of appellate review is applicable to juvenile court proceedings. (In re Roderick P., supra, 7 Cal.3d 801, 809.) In my view, the test on appellate review ought to be whether guilt is established beyond a reasonable doubt.

But instead of the test being whether guilt is established beyond a reasonable doubt, the appellate court makes a determination of whether a reasonable trier of fact could have found that the prosecution had established the defendant's guilt beyond a reasonable doubt. However, "'"in determining whether the record is sufficient in this respect the appellate court can give credit only to 'substantial' evidence, i.e., evidence that reasonably inspires confidence and is 'of solid value.'"'" (In re Roderick P., supra, 7 Cal.3d 801, 809.)

Herein lie the seeds that so easily may sprout injustice to a defendant or minor charged with the commission of a child molestation offense. What constitutes "substantial" evidence--evidence that is supposed to reasonably inspire confidence? What is evidence of "solid value"? There is no doubt that the decisional law has sanctioned the view that a child complaining witness' testimony, though suspect and permeated with indicia of untrustworthi-

ness and unreliability, constitutes "substantial" evidence that reasonably inspires confidence and is of "solid value," simply and solely because a trial judge chose to believe such testimony. Although I deplore and detest the offense of child molestation, I cannot agree with the principle of appellate review that permits a trial judge to convert such untrustworthy and unreliable testimony into "substantial" evidence when such evidence cannot possibly reasonably inspire confidence and is totally lacking in "solid value."

In my judgment, the victim's testimony in the case at bench does not constitute "substantial" evidence. It is not "evidence that reasonably inspires confidence and is of solid value." It is of significance that the majority points out and admits that the prosecution's evidence was weak in that the medical evidence established that it was medically impossible for the minor to have had sexual intercourse with the victim as described by her in her

testimony. She still had an unruptured hymen after this alleged incident, and there was no indication of any bleeding or semen present. In addition, the five-year-old victim's testimony was rampant with discrepancies and inconsistencies.

For the appellate courts to cling to a rule of appellate review that permits this kind of testimony to amount to "'"'substantial' evidence, i.e., evidence that reasonably inspires confidence and is 'of solid value'"'" (In re Roderick P., supra, 7 Cal.3d 801, 809) constitutes a perpetuation of injustice to a defendant convicted upon such testimony or to a minor declared to be a ward of the juvenile court as the result of such testimony. In my view the appellate courts should no longer follow the rule that, irrespective of its established lack of credibility and trustworthiness, the testimony of a complaining child witness in a child molestation case is deemed sufficient to sustain a finding of guilt on the part of an adult or a finding of a violation of the pertinent criminal code section by a minor in a

juvenile court proceeding.

In making a determination of whether the testimony of a child complaining witness in a sex molestation case has within it the requisite indicia of reliability to preclude an appellate court from finding that it fails to satisfy the test of "substantial evidence"--evidence that is capable of inspiring confidence and is of solid value--there should be no distinction between such testimony as direct evidence and evidence that is circumstantial evidence or hearsay evidence that is admitted under some exception to the hearsay rule. I thus fail to see how the direct evidence in the form of the testimony of the child complaining witness in the case at bench is any more reliable under the circumstances presented than the evidence of the prior unsworn, out-of-court statements given by an apparent accomplice and repudiated, but which becomes admissible under the exception to the hearsay rule for prior inconsistent statements found in In re Eugene M. (1976) 55 Cal.App.3d 650

[127 Cal.Rptr. 851]. The proof in the Eugene M. case was found to be "so fraught with uncertainty as to preclude a confident determination of guilt beyond a reasonable doubt." (Id., at p. 659.) The prosecution's evidence in Eugene M. thus failed "to meet the necessary standard that it inspire confidence and be of solid value." (Ibid.) As in Eugene M., the prosecution's evidence in the case at bench comes within the principle that "[e]vidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact." (People v. Redmond (1969) 71 Cal.2d 745, 755 [79 Cal.Rptr. 529, 457 P.2d 321].)

II

The Constitutional Inadequacy of the Minor's Trial Counsel

The minor's contention that he was denied his constitutional right of effective assistance of trial is predicated on the fact that his trial counsel

failed to make a Ballard motion to have trial court appoint a psychiatrist to conduct a psychiatric examination of the child complaining witness. (See Ballard v. Superior Court (1966) 64 Cal. 2d 159 [49 Cal.Rptr. 302, 410 P.2d 838, 18 A.L.R.3d 1416].) The majority holds that there is nothing in the record before us to lead to a conclusion other than that the failure of defendant's trial counsel to seek a psychiatric examination of the child complaining witness was anything other than a "reasoned tactical decision." I consider this view of the majority to be erroneous, untenable and a misapplication of the rules of law pertaining to what constitutes ineffective assistance of trial counsel to deprive a criminal defendant of his constitutional rights.

The majority recognizes that the seminal case of Ballard held that trial judges possessed a discretion to order a psychiatric examination of complaining witnesses in sexual offense cases in order to provide defendants with evidence to attack the credibility

of such witnesses. Since the Ballard court talks about the discretionary power of the trial court to order a psychiatric examination of a complaining witness, the majority seems to assume that had the minor's attorney sought a psychiatric examination of the five-year-old complaining witness, the trial judge could have exercised a valid discretion and denied the request. It is my view that because of the crucial posture of the issue involved--the credibility of this five-year-old complaining witness contrasted with the credibility of the minor and his defense witnesses, it would have been a gross abuse of discretion for the trial court to have denied a motion made by defense counsel for such a psychiatric examination.

As pointed out by the Ballard court, "Professor Wigmore, in a widely quoted passage, stated, 'No judge should ever let a sex-offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician.' (3 Wigmore,

Evidence, supra, 460, italics omitted.) [¶] This concern is stimulated by the possibility that a believable complaining witness, who suffers from an emotional condition inducing her belief that she has been subjected to a sexual offense, may charge some male with that offense. Thus, the testimony of a sympathy-arousing child may lead to the conviction of an unattractive defendant, subjecting him to a lengthy prison term." (Italics added.) (Ballard, supra, 64 Cal.2d 159, 172.)

In People v. Lang (1974) 11 Cal.3d 134, 140, footnote 3 [113 Cal. Rptr. 9, 520 P.2d 393], the court expounded upon its views set forth in Ballard by stating: "Such an examination would seem a minimum protection for a defendant charged with molesting a child, and only the rarest of cases would excuse counsel from obtaining one." (Italics added.) That a psychiatric examination of an alleged child victim who testifies to a molestation by a defendant is of acute importance and significance is emphasized in People v.

Thomas (1978) 20 Cal.3d 457, 472 [143 Cal.Rptr. 215, 573 P.2d 433], in which it was stated: "While this court in Ballard specifically refrained from requiring such an examination in every type of sexual offense case, it later explained that a Ballard-type examination '. . . would seem a minimum protection for a defendant charged with molesting a child, and only the rarest of cases would excuse counsel from obtaining one.' [Citation.]" (Conc. opn.) (Italics in original.)

The rules with respect to what constitutes a constitutional inadequacy of trial counsel appear to be fairly well established. As we stated in In re Julius B. (1977) 68 Cal.App.3d 395, 402 [137 Cal.Rptr. 341], "[t]he trial must, because of counsel's inadequacy, have been reduced to a 'farce or a sham.' (People v. Ibarra (1963) 60 Cal.2d 460, 464 [34 Cal.Rptr. 863, 386 P.2d 487]; People v. Reeves (1966) 64 Cal.2d 766 [51 Cal.Rptr. 691, 415 P.2d 35].) An errorless trial is not the standard (In re Saunders, supra,

2 Cal.3d 1033, at p. 1041 [88 Cal.Rptr. 633, 472 P.2d 921]), and an unfortunate choice of trial strategy has been held, on occasion, not to constitute the type of inadequacy necessitating reversal. As People v. Floyd (1970) 1 Cal.3d 694, 709 [83 Cal.Rptr. 608, 464 P.2d 64] so cogently stated: 'It is not sufficient to allege merely that the attorney's tactics were poor, or that the case might have been handled more effectively. [Citations.] [¶] Rather, the defendant must affirmatively show that the omissions of defense counsel involved a critical issue, and that the omissions cannot be explained on the basis of any knowledgeable choice of tactics.' . . . " (Italics in original.)

In the case at bench the minor's defense, presented through a number of witnesses including the minor's own testimony, was a complete denial of having committed the offense. The defense was substantially an alibi. In this situation the credibility of the five-year-old complaining witness, as contrasted with the credibility of

the minor and other defense witnesses, became the crucial determination for the guilt or innocence of the minor. Under these circumstances, a failure by the minor's trial counsel to seek a psychiatric examination of the five-year-old complaining witness which might cast doubt on the credibility of her testimony and thus support the credibility of the minor and his defense witnesses, constitutes a withdrawal of a crucial defense just as effectively as if no testimony at all had been introduced by defense counsel in an effort to prove the minor's denial defense.

We stated in People v. Rodriguez (1977) 73 Cal.App.3d 1023, 1031-1032 [141 Cal.Rptr. 118]: "There is no magic formula for applying the rule that inadequate representation must reduce the trial to a farce or a sham before it amounts to a constitutionally inadequate representation. There is no logical distinction between the situation of counsel's inadequate preparation that results in

a failure to consider and introduce corroborating evidence needed to make a crucial defense, such as an alibi, substantial and effective. A defendant's trial is reduced to a farce or sham in the latter situation with equal effectiveness as in the former situation." (Italics in original.)

Apparently the majority takes the view that if the minor is to establish inadequacy of trial counsel he must prove that a psychiatric examination of the five-year-old complaining witness would have been such as to cast doubt upon her credibility beyond any question. In my view this is a misinterpretation of the requirement of People v. Ibarra (1963) 60 Cal.2d 460 [34 Cal.Rptr. 863, 386 P.2d 487]. I do not read Ibarra as holding that the ajudication of a defense of which a defendant has been deprived by the failure of counsel would result inexorably in the defendant's acquittal. "It is the failure to have an appropriate ajudication of a defense that reduces the trial to a 'farce or a

sham,' and which thus renders a defendant's trial fundamentally unfair--in violation of the constitutional due process rights guaranteed to a defendant." (Rodriguez, supra, 73 Cal.App.3d 1023, 1028.)

Thus, in In re Saunders (1970) 2 Cal.3d 1033 [88 Cal.Rptr. 633, 472 P.2d 921], defense counsel in a murder case undertook no serious efforts to obtain available medical records of defendant which reflected defendant's past diagnosis and treatment for head injuries and made no effort to have defendant examined by a psychiatrist. Defense counsel decided not to present the defense of diminished capacity. In holding that defense counsel's omissions constituted ineffective assistance of counsel, the court remarked: "We cannot say, of course, what such further inquiry might have revealed. Indeed, if counsel had sought to obtain other available records and had undertaken to have petitioner examined by a psychiatrist he might well have properly concluded on the basis of information

so obtained to withhold any defense based upon petitioner's mental condition at the time of the offense. On the other hand, such investigation might have produced evidence upon the basis of which counsel would have wished to present a defense. By failing to make any effort at all to follow the lead afforded by information in his possession counsel precluded himself from making a rational decision on the question." (In re Saunders, supra, 2 Cal.3d 1033, 1049.)

It is my view that the record in the case at bench demonstrates unquestionably that the failure of the minor's trial counsel to seek a court-ordered psychiatric examination of the five-year-old complaining witness was not the result of any unfortunate choice of trial strategy. This omission of the minor's trial counsel simply "'cannot be explained on the basis of any knowledgeable choice of tactics.'" (Julius B., supra, 68 Cal.App.3d 395, 402.) (Italics in original.)

The record reveals that the

minor's trial counsel sought to elicit evidence of the five-year-old complaining witness' tendency to falsify and her capacity and propensity for fantasy through cross-examination of the mother of the complaining witness. This shows that defense counsel was not completely unaware of the possibility of using the factor of a complaining witness' emotional and mental condition as a means of attacking her credibility as a witness, and, hence, that his omission to seek a psychiatric examination of the complaining witness cannot be considered a knowledgeable choice of trial tactics.

Finally, I allude to one other matter that amply demonstrates that defense counsel's omission to seek a court-ordered psychiatric examination of the five-year-old complaining witness cannot logically be attributed to a choice of trial tactics. I refer to the trial court's comment on defense counsel's performance in the case at bench. Durihg the disposition hearing the juvenile court stated on the record: "and, furthermore, very candidly I got

the distinct impression throughout the trial, Mr. [defense counsel], that you were not overly experienced in criminal and juvenile matters, . . . "

It seems to me that our high court's view in People v. Lang, supra, demonstrates, with inexorable logic and compulsion, that defense counsel in the case at bench should have sought a psychiatric examination of the five-year-old complaining witness if he was to give the minor the effective assistance of trial counsel which is constitutionally required. When the court in Lang made the statement that "[s]uch an examination [a psychiatric examination of the complaining witness] would seem a minimum protection for a defendant charged with molesting a child, and only the rarest of cases would excuse counsel from obtaining one" (Lang, supra, 11 Cal.3d 134, 140, fn.3) (italics added), I see no basis for a conclusion that, in the case before us, a psychiatric examination of the complaining witness was not needed as a minimum protection for the minor who was charged

with child molestation. Nor do I see how the instant case can be classified as falling within the exception of being one of those rare cases which would excuse defense counsel from seeking to obtain such a psychiatric examination.

On the contrary, the record before us is such that the conslusion is inescapable that if there exists any case in which a psychiatric examination of the child complaining witness is required in order to provide a defendant or a minor in a juvenile court proceeding with a crucial defense, it is the case at bench. I would thus hold that the minor before us has been deprived of his constitutional right to effective assistance of trial counsel.

III

Disposition

Since, in my view, the evidence was insufficient to sustain the juvenile court's finding that the minor had committed a violation of Penal Code section 288, I would reverse the orders of the juvenile court with instructions

to dismiss the petition. A second trial would be in violation of the minor's constitutional right against double jeopardy.

In Burks v. United States (1978) ___ U.S.___ [57 L.Ed.2d 1, 98 S.Ct.___], our nation's highest court declared that if a reviewing court reverses a defendant's conviction on the ground of insufficiency of the evidence to sustain the conviction, the double jeopardy clause of the United States Constitution precludes a retrial.

In Burks, the court remarked: "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials. The Clause does not allow 'the State . . . to make repeated attempts to convict an individual for an alleged offense,' since 'the constitutional prohibition against "double jeopardy" was designed to protect an individual

from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.' [Citations.]" (Burks, supra, ___U.S.___, ___[57 L.Ed.2d 1, 9-10]; fn. omitted.)

The Burks court also made this significant comment" "We recognize that under the terms of the remand in this case the District Court might very well conclude, after 'a balancing of the equities,' that a second trial should not be held. Nonetheless, where the Double Jeopardy Clause is applicable, its sweep is absolute. There are no 'equities' to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination." (Id. at p. ___, fn. 6 [57 L.Ed.2d at p. 9].)

APPENDIX B

[ORDER OF SUPREME COURT OF CALIFORNIA DENYING HEARING]

[CAPTION OMITTED]

January 3, 1979.

Appellant's Petition for Hearing DENIED.

TOBRINER
Acting Chief Justice

NEWMAN, J., is of the opinion that the petition should be granted.